RECENT DECISIONS

BANKS AND BANKING—WITHDRAWAL OF DEPOSITS—DISCHARGE OF SURETY.—A bank acquired a certain note from the payee, knowing that the defendant was an accommodation maker and in legal effect only a surety thereon. At the maturity of the note the payee had on deposit in the bank an amount sufficient to pay it, but the bank failed to apply the funds to its payment, allowing the payee to withdraw them; and brought an action against the accommodation maker on the note. *Held*, the accommodation maker is discharged. *Tatum* v. *Commercial Bank & Trust Co.* (Ala.), 69 South. 508.

The rule is well settled that when a creditor holds collateral security for the payment of a note and releases such collateral, he thereby discharges the sureties. *Barret* v. *Bass*, 105 Ga. 421, 31 S. E. 435; *Hutchinson* v. *Woodwell*, 107 Pa. St. 509. Also that when a bank is the holder of a note at maturity it has the right to apply any deposit, which it holds for the maker, to the payment of such note. *Wood* v. *Boylston Nat. Bank*, 129 Mass. 358, 37 *Am. Rep.* 366. *See Central Nat. Bank* v. *Conn. Mut. Life Ins. Co.*, 104 *U. S.* 54. However, a bank which accepts a deposit of money for a certain purpose, agreeing to pay the amount when needed, cannot apply it to the payment of debts due the bank by the depositor. *Smith* v. *Sanburn State Bank*, 147 Iowa 640, 126 N. W. 779, 30 L. R. A. (N. S.) 779.

But whether banks in such cases are required to apply such deposits in order to prevent the discharge of the sureties, has given rise to irreconcilable conflict of opinion. The bank is the absolute owner of money deposited in it, and is merely a debtor to the general account of the depositor for such amount; therefore the depositor has no title to the fund so deposited of which a surety can avail himself. *Camp* v. *First Nat. Bank*, 44 Fla. 497, 33 South. 241, 103 Am. St. Rep. 173. This seems to be the prevailing rule. *Davenport* v. *St. Banking Co.*, 126 Ga. 136, 54 S. E. 977, 8 L. R. A. (N. S.) 944; *Cit. Bank* v. *Booze*, 75 Mo. App. 189. However, there are a number of respectable authorities in accord with the decision of the principal case. *Bank* v. *Foreman*, 138 Pa. St. 474, 21 Atl. 20; *Burgess* v. *Deposit Bank*, 30 Ky. L. Rep. 177, 97 S. W. 761.

BILLS AND NOTES—STIPULATIONS FOR ATTORNEY'S FEES—USURY.—The defendant made a note containing a provision that in case of suit for collection he would be liable for attorney's fees. *Held*, the transaction is not usurious. *International Motor Co.* v. *Palmer*, 155 N. Y. Supp. 357.

The negotiability of a note containing such a stipulation has been attacked on the ground that the amount is rendered uncertain and the payment conditional. *Kendall* v. *Parker*, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; *Maryland Fertilizing & Mfg. Co.* v. *Newman*, 16 Md. 584, 45 Am. Rep. 750; *First Nat'l Bank of Stillwater* v. *Larsen*, 60 Wis. 206, 19 N. W. 67. But the better view is that its negotiability is not destroyed, for a negotiable instrument only passes as money until ma-

turity, and until then the amount is certain, it being only after default that any uncertainty arises. *Cherry* v. *Sprague,* 187 Mass. 113, 72 N. E. 456, 105 Am. St. Rep. 381, 67 L. R. A. 33; *Dorsey* v. *Wolfe,* 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99; *Garr* v. *Louisville Baking Co.,* 11 Bush. (Ky.) 180, 21 Am. Rep. 209.

Such a stipulation has been held void as a penalty and therefore unenforceable as contrary to public policy. It tends to oppress the debtor and offers a ready cover for usury. *Merchants Nat'l Bank* v. *Sevier,* 14 Fed. 662; *Tinsley* v. *Hoskins,* 111 N. C. 340, 16 S. E. 325, 32 Am. St. Rep. 801. The better view is, however, that such a stipulation is valid and binding. *Salsbury* v. *Stewart,* 15 Utah 308, 49 Pac. 777, 62 Am. St. Rep. 934; *Smith* v. *Silvers,* 32 Ind. 321. Its enforcement would tend to lessen the rate of interest because it shows confidence on the part of the borrower that he will be able to pay at maturity without delay. See *Hollin* v. *Drexel,* 7 Watts (Pa.) 126. Again it is eminently just and equitable that the party in default should pay the expenses of a suit for collection. See *Smith* v. *Silver, supra; Nat'l Bank* v. *Danforth,* 80 Ga. 55, 7 S. E. 546.

The same conflict is found on the question of whether the contract is usurious. A few cases hold that it is. *Dow* v. *Updike,* 11 Neb. 95, 7 N. W. 857; *Wright* v. *Traver,* 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50. But the great weight of authority is contrary, for the additional stipulation is in the nature of indemnity against loss and not strictly an increase of interest. *Fowler* v. *Equitable Trust Co.,* 141 U. S. 411; *Campbell* v. *Shields,* 6 Leigh (Va.) 517; *Stewart* v. *Tenison Bros. Saddlery Co.,* 21 Tex. Civ. App. 530, 53 S. W. 83.

CARRIERS—CARRIAGE OF SHOWS—DELAY IN TRANSPORTATION—DAMAGES.—The defendant, having notice of the use to which the goods were to be put and the purpose of the shipment, negligently delayed to transport the shows of the plaintiff, so that the latter was deprived of their use for a day. *Held,* only nominal damages are recoverable. *Central of Georga Ry. Co.* v. *Weaver* (Ala.), 69 So. 521.

In order to recover for the breach of a contract such damages as are occasioned by the special circumstances surrounding the contract, the party sought to be held liable must know of the circumstances which may give rise to the claim for such damages, and the damages must be the natural consequence of the breach in view of the circumstances. *Hadley* v. *Baxendale,* 9 Exch. 341; *Traywick* v. *Southern Ry. Co.,* 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; *Harper Furniture Co.* v. *Southern Express Co.,* 148 N. C. 87, 62 S. E. 145, 31 L. R. A. (N. S.) 483.

The theory on which the law gives such damages after notice is that such was the intention of the parties. *Globe Refining Co.* v. *Landa Cotton Oil Co.,* 190 U. S. 540; *Lonergan* v. *Waldo,* 179 Mass. 135, 60 N. E. 479. By the better authority, then, the party sought to be held liable must have notice or knowledge of the circumstances at the time the contract is made. *Jordan* v. *Patterson,* 67 Conn. 473, 35 Atl. 521; *Bradley* v. *Chicago, M. & S. P. Ry.,* 94 Wis. 44, 68 N. W. 410. Such notice must form the basis of the contract, though it need not be a part of